

*In the Matter of Tracy Medwin and Philip DiGavero,
Sheriff's Officer Sergeant (PC2633E), Morris County*
DOP Docket Nos. 2006-1149 and 2006-1150
(Merit System Board, decided May 24, 2006)

Tracy Medwin and Philip DiGavero, represented by Benjamin Benson, Esq., request reconsideration of the final administrative determination in *In the Matter of Richard Ferraro, et al., Sheriff's Officer Sergeant* (MSB, decided September 7, 2005). A copy of that decision is attached hereto and incorporated herein. These appeals have been consolidated due to common issues presented by the appellants.

By way of background, the subject list was promulgated on August 12, 2004, on which Ms. Medwin and Mr. DiGavero ranked sixth and fifth, respectively. The subject list was issued conditionally pending the outcome of exam item appeals. The Morris County Sheriff's Office requested and the Department of Personnel issued a certification on September 7, 2004 (Certification No. PL041602) on which their names appeared at positions nine and five, respectively. The eligibles in the first six positions, including Mr. DiGavero, received regular conditional appointments on October 4, 2004. A second certification from the subject list was issued on May 24, 2005 (Certification No. PL050940) on which Ms. Medwin was the third ranked eligible. Ms. Medwin received a regular conditional appointment on July 5, 2005.¹ Subsequently, as a result of the Board's decision in *Ferraro, supra*, question 2 and question 60 were omitted from scoring and their ranks changed to 17th and 11th, respectively. It is noted that certification activity has been stayed pending the outcome of this matter.

On appeal, Ms. Medwin and Mr. DiGavero contend that there were material errors in *Ferraro, supra*, in that questions 2 and 60 were not vague and could be answered as long as candidates were prepared and well-versed in the law. While the decision indicates that there were 80 questions, the test consisted of 70 questions and "this alone dramatically affected the scoring of the examination. In addition, the Board, in granting the appeal, relied on incorrect and erroneous information submitted by appellants . . ." They assert that they were not given the opportunity to provide the Board with information prior to its September 7, 2005 decision since they were not aware that appeals existed until September 15, 2005. They argue that had they been aware, "the Board would have been informed that the appellants relied on incorrect information when granting the appeal." They request that the Board "enter an order requiring the County to 'grandfather' [their] titles as Sergeants in the Morris County Sheriff's Office . . . [since both] have been providing exemplary service to the County for a substantial period of time and it would be entirely inequitable to remove them from their positions . . . Further, a demotion would require that both [appellants] to potentially [*sic*] take orders from

¹ It is noted that Department of Personnel records do not indicate that PL050940 was returned.

officers that they previously supervised.” In support of their request, they provide certifications dated September 23, 2005 and additional documentation including: Mr. DiGavero’s Notification of Eligibility dated August 4, 2004; Mr. DiGavero’s Notification of Certification dated September 23, 2004; and a Morris County Sheriff’s Office Personnel Order dated September 24, 2004 indicating Mr. DiGavero’s promotion to the rank of Sergeant.

In his certification, Mr. DiGavero states that he submitted an appeal regarding question 51. On or about August 4, 2004, he received a Notification of Eligibility which expressly stated that “appointments from the list would be recorded as regular appointments conditional pending any adjudication of appeals that could subject an appointee to displacement by a successful appellant.” On or about August 14, 2004, he had a meeting with Chief Thomas G. Baxter to discuss his potential promotion and was told that he “should not be concerned about possible appeals as it pertained to my chances of being promoted. In fact, I specifically remember him stating, ‘Once you are made, they can’t take your stripes away from you.’ This led me to believe that once I received a promotion, I would not be stripped of my title after I completed the proscribed working test period.” He indicates that around the same time, he contacted the Department of Personnel (DOP) and he was informed that prior to the list issuance, two questions had been eliminated and his score would not be further affected by any appeals. On or about September 23, 2004, he received a Notification of Certification. Since the notice stated that “appointees may not call or write the NJDOP for the status of the certification[,] it was my understanding that I was no longer able to contact NJDOP [with] any questions or concerns that I had after the notice date. Nowhere on the certification does it state that appointments would be made conditionally . . . I was never advised that my position was conditional at this time [pursuant to *N.J.A.C. 4A:4-1.4(d)*].” On or about September 24, 2004, he received a personnel order from Chief Baxter indicating that effective October 4, 2004, he was promoted to the rank of Sergeant and “nowhere in this letter does it state that I would remain a conditional employee. The letter only acknowledges that pursuant to the NJDOP, an appointee is required to successfully complete the working test period, as required by all positions.” On or about February 1, 2005, he received a letter from the DOP stating that questions 1 and 51 had been eliminated from scoring by the Division of Selection Services and thus, his appeal was moot. Accordingly, he “believed that all appeals had been decided by February 1, 2005 and that my position was no longer in jeopardy from any pending appeals.” On or about September 16, 2005, he was apprised of the Board’s decision in *Ferraro, supra*, and “became utterly distressed when I learned that there was an appeal still pending approximately one year after my appointment, which I long ago believed was permanent.” Mr. DiGavero details the financial consequences and his family planning choices that followed his promotion.

He maintains that questions 2 and 60 “were not, in fact, vague and therefore, should not be eliminated. Specifically, the [candidates’] failure to adequately prepare for the exam or general lack of knowledge of the subject matter should not require that questions number 2 and 60 be eliminated from scoring.” He states that on the exam administration date, the room monitor never advised the test takers of how many questions they were required to complete and he assumed that he had to answer all 80 questions contained in the test booklet. He overheard the room monitor tell another test taker that he only had to complete 70 questions and he erased the last ten answers from his answer sheet.

He argues that for question 2, the Board relied on Kenneth Sharrock’s appeal of this question in making its decision. He disagrees with Mr. Sharrock’s “erroneous assertion that the time limitation in question is seven years . . . All applicants should be familiar with the fact that the majority of crimes have a five year statute of limitation for prosecution, unless otherwise provided or set fort[h] in *N.J.S.A.* 2C:1-6 . . .” He contends that conspiracy to commit robbery is a crime covered under the five year statute of limitations. He notes that five years was not one of the answer choices and thus, the correct choice would be the keyed response, option d, no time limitation applies. He asserts that David Wentworth relied on *N.J.S.A.* 2A:160-2 (Expenses of returning fugitives from justice) which is inapplicable to the scenario presented in the question.

With respect to question 60, he argues that *venire* “is a legal vocabulary word that is found in numerous, if not all, legal dictionaries in the world.” He provides the definition of *venire facias* from Black’s Law Dictionary and the definition of *venire* from Webster’s II New College Dictionary. He argues that eliminating question 60 because it “requires knowledge of a function not performed on a daily basis would essentially opens a floodgates [*sic*] to all similar claims in promotional exams.” He also argues that “it is of the utmost importance that Sheriff’s Officer’s [*sic*], especially Sheriff’s Officer Sergeants, [know] and understand that [S]heriff’s [O]fficers have the powers to execute such a writ.” He presents that *N.J.S.A.* 40A:9-117.18 (Duties) “specifically lists Law Encyclopedias under Library References the references [*sic*]” and refers to *American Jurisprudence* which states, “The Sheriff and his deputies have also been said to be officers of the court, with the duty to execute all writs returnable to court.” He avers that *venire* is a term with which a Sheriff’s Officer Sergeant should be familiar since it is a power that is expressly granted to them whether or not it is used on a daily basis.

In her certification, Ms. Medwin indicates that she was a Morris County Sheriff’s Officer from June 2000 until she was promoted on June 14, 2005 to Sheriff’s Officer Sergeant. On or about August 4, 2004, she received a Notification of Eligibility which, as indicated by Mr. DiGavero, stated that appointments were conditional. On or about September 23, 2004, she received a Notification of Certification which indicated that she was ninth on the certification. She thought,

as did Mr. DiGavero, that she could not call or write to the DOP for the status of the certification. On or about June 1, 2005, she received another Notification of Certification which indicated that she was third on the certification. On or about June 14, 2005, she received a personnel order from Chief Baxter indicating that effective July 5, 2005, she was promoted to the rank of Sergeant and “nowhere in this letter does it state that I would remain a conditional employee.” On or about September 16, 2005, she was apprised of the Board’s decision in *Ferraro, supra*, and fully believed that all pending appeals had been adjudicated prior to the September 7, 2005 decision. She maintains that neither of the Notifications of Certification “alluded to the fact that the appointment would be conditional.” She argues that the term “Regular Appointment Conditional” is not defined on the Department website and it does not discuss that “an appointee could be divested of their promotion due to a pending appeal.” She argues that her situation fits the definition of “demotion” and she fears that “numerous family members and colleagues will believe that I was terminated for one of the reasons on the NJDOP’s enumerated list of reasons for demoting an employee.”

Ms. Medwin’s certification contains the same allegations as Mr. DiGavero’s regarding the subject examination and also details the financial consequences and her family planning choices that followed her promotion.

In a certification dated October 24, 2005, Ms. Medwin presents that between September 28 and 29, 2005 she contacted every Sheriff’s Department in the State that had candidates for the subject exam to see if they were affected by the rescoring. Specifically, she indicates that Mercer County advised her that it is routine for the Undersheriff to contact the DOP after the initial scoring notices are sent out to determine if there are any outstanding appeals. She was also advised that two eligibles were appointed as “Acting” Sergeants pending the determination of outstanding appeals and were advised as such. Monmouth County indicated that only two eligibles were promoted and they were aware that their promotions were conditional pending the outcome of the appeal process. While she was advised by Cape May County that it had not promoted anyone at the time, it would be typical for the Sheriff’s Department to contact the DOP to determine if there were any pending appeals prior to making any appointments. Salem County indicated that it is standard procedure to call the DOP before making an appointment to ask for the DOP’s approval and determine whether there are any pending appeals. Any appointees are aware they are “Acting” Sergeants until informed otherwise. She presents that the Morris County Sheriff’s Office never advised her or anyone promoted from the subject list that the appointments were conditional pending appeals and the Sheriff’s Office never contacted the DOP to determine if any appeals were pending. She maintains that the Morris County Sheriff’s Office had a duty to advise her that her promotion to Sheriff’s Officer Sergeant was conditional. She indicates that since the promulgation of the rescored list, her work environment has become extremely uncomfortable. She argues that she “should be

‘grandfathered’ into my position, based upon the clear language of *N.J.A.C. 4A:4-2.7* . . .” She states that she met with Sheriff Rochford on September 30, 2005 and was advised by him that he did not intend to provide the DOP with a statement but he fully supported both her appeal and Mr. DiGavero’s appeal. On or about October 7, 2005, she was approached by the Sheriff and the Undersheriff who advised her that County Counsel would not allow them to submit a statement to the DOP because the County did not want to be involved in the matter. She emphasizes that she and her family will suffer substantial hardship if she is returned to the title of Sheriff’s Officer, especially since her promotion was well publicized within the County. She indicates that her return to Sheriff’s Officer will result in great injustice since she was sworn in by the County Assignment Judge. She submits additional documentation including: a copy of the subject list promulgated on September eligible list issued on September 28, 2005; the Fall 2005 Morris County Employee News announcing the birth of her son; and a copy of the oath of office signed and dated July 5, 2005.

In a certification dated October 24, 2005, Mr. DiGavero indicates that he was appointed as a Correction Officer in Morris County in July, 1994 but he decided his true passion was to become a Sheriff’s Officer. He took a pay cut of approximately \$25,000 when he transferred to the Morris County Sheriff’s Office. He notes that when he met with Sheriff Rochford on October 17, 2005, he was advised that the Sheriff was not aware of any pending appeals after the original list was promulgated and if he were aware, he would have made all Sergeants promoted from the list “acting” Sergeants. The Sheriff believed that Mr. DiGavero’s Oath of Office, which was signed by the Assignment Judge, was a binding contract. The Sheriff felt it would be an injustice if he were demoted based on the recalculation of scores and he fully supported the appeals from Mr. DiGavero and Ms. Medwin. He was later advised that the Sheriff was not allowed to provide the DOP with any information on the matter because the County did not want to expend money on an attorney to defend his position. He states that when he reviewed the exam, he was informed by DOP staff that question 1 was omitted from scoring due to vagueness, which was not stated in *Ferraro, supra*.² He was also informed that question 60 was omitted because the State of New Jersey carries out the function of summoning jurors. He maintains that this is factually incorrect because “there have been times when a Judge has requested that a Sheriff’s Officer summons a juror when the juror shirks their jury duty requirement” and “Sheriff’s Officers do summons [*sic*] jurors for State Grand Jury and that this is, in fact, a similar, if not an identical scenario.” With respect to question 2, he refers to *N.J.S.A. 2C:5-2a(2)* and indicates that bank robbery is a first or second degree crime. He argues that “pursuant to statutory law concerning conspiracy, no overt act is required for a first or second degree crime. Notwithstanding the fact that an overt act is not needed in the above-mentioned case, an overt act was completed when the twenty-two (22) year old female mapped

² It is noted that in *Ferraro, supra*, the Board discussed why question 1 and question 51 were omitted from scoring.

out an escape route for individuals who were involved in a bank robbery, and thus, would make her culpable for completing the act of conspiracy to commit bank robbery.” He contends that the woman could be charged as an accomplice, pursuant to *N.J.S.A. 2C:2-6*. Since the statute of limitations for prosecution of either crime would be five years, the wrong answer choices could be easily eliminated and “it is patently obvious that the best answer choice is [option] d.” With respect to question 60, he notes that the Orientation Guide indicated that “14.28% of the examination would be based on Court Practice, which arguably includes the vocabulary definition [contained in the question].” He argues that the “term should not be discounted if the Sheriff’s Officers still have the power to carry out such duties.” He presents that he contacted the Sheriff’s Offices in Atlantic, Burlington, Essex, Middlesex, Monmouth and Morris counties and each continues to carry out the duty of serving State Grand Jury summonses. He submits a copy of the subject list issued on September 28, 2005.

In a subsequent submission dated October 28, 2005, the appellants submit additional documentation including: Mr. DiGavero’s Notification of Eligibility dated September 28, 2005; a Special Candidate Notice dated September 28, 2005; a County of Morris Personnel Requisition form dated October 2004; a letter dated November 15, 2004 from James J. Rosenberg, County Administrator, to Mr. DiGavero; Ms. Medwin’s Notification of Eligibility dated September 28, 2005; a Morris County Sheriff’s Office Photo Request form; and a memorandum dated October 7, 2005 from Ronald Kevitz, Esq., Morris County Counsel to Sheriff Rochford.

CONCLUSION

N.J.A.C. 4A:2-1.6(b) sets forth the standards by which the Board may reconsider a prior decision. This rule provides that a party must show that a clear material error occurred or present new evidence or additional information which would change the outcome of the case and the reasons that such evidence was not presented during the original proceeding.

In the present matter, the appellants have failed to meet the standard for reconsideration. The appellants do not present new evidence or additional information which was not presented at the original proceeding which would change the outcome of the original decision, nor have the appellants proven that a clear material error has occurred in the original decision. Accordingly, based on the record presented, the appellants have failed to support their burden of proof in this matter.

N.J.A.C. 4A:4-6.3 (Examination and selection appeals) provides that appeals may be made on examination items, scoring and administration. *See N.J.A.C. 4A:4-6.3(a)1. N.J.A.C. 4A:4-6.3(c)* provides that the filing of an appeal shall not affect the

promulgation of a list, a certification or an appointment. *N.J.A.C. 4A:4-1.4* (Conditional regular appointments) provides:

- (a) A conditional regular appointment may be made in the competitive division of the career service when disputes or appeals concerning higher ranked eligibles may affect the final appointments. The names of conditional appointees shall remain on the eligible list for consideration for other employment.
- (b) If the rights of a higher ranked eligible are upheld, the conditional regular appointment shall end.
- (c) If the final determination of appointment rights causes no change in the selection process, the conditional appointment will be changed to a regular appointment.
- (d) The appointing authority shall advise conditional appointees of their status and rights, including any change in appointment status.

For public safety promotional examinations, it is generally assumed that appeals will be filed by the constituent population. Accordingly, the Department of Personnel issues such lists as conditional. As noted on the Notification of Eligibility dated August 4, 2004, under the section entitled, "IMPORTANT INFORMATION ABOUT APPOINTMENTS," "The Appointing Authority may request permanent appointments from the certifications issued from this list. If made, the Appointing Authority will request and the Department of Personnel will record the appointment of eligibles as Regular Appointments Conditional, pending adjudication of appeals. Should the appeals be decided in favor of the appellants, and should their appointments be mandated by the Department of Personnel, employees holding Regular Appointments Conditional may be subjected to displacement by the successful appellants. Should such displacement be mandated, Regular Appointments Conditional will be rescinded and the names of the appointees will be returned to the eligible list."

It is noted that the Notification of Certification does not indicate that appointments are conditional. The Department of Personnel does not make any appointments as this is the role of the appointing authority. As such, it is incumbent upon the appointing authority to notify candidates of their conditional status. See *N.J.A.C. 4A:4-1.4(d)*. There is no evidence in the record that the appointing authority informed either Mr. DiGavero or Ms. Medwin of their conditional status. It is noted that appellants do not claim that they would not have accepted their appointments to the subject title if the appointing authority had advised them that the appointments were conditional. Thus, the issue before the Board is whether there is any remedy available to the appellants.

In this regard, the Department of Personnel's role is to provide appointing authorities with lists of individuals who have been tested and ranked based on their performance on the examination. Then, acting within the parameters of Merit System law and rules such as the Rule of Three, it is the appointing authority's function to appoint those individuals who best meet its needs. The appellants were appointed based on their initial ranks on the subject list. However, that list was updated based on the adjudication of appeals and their positions on the list changed. Question 2 was determined to be flawed and question 60 was determined to be inappropriate for the subject title. Accordingly, these questions were removed from the scoring process. It is noted that in the process of making its determination, the Board considered the impact of omitting these items on those individuals who answered correctly. *N.J.A.C. 4A:4-3.8* provides that the Department of Personnel may correct an error at any time and that corrections of errors may result in a change in ranking. See *N.J.A.C. 4A:4-3.8(a)* and *(c)*. See also *In the Matter of Senior Training Technician (PC2241C)*, Passaic County Board of Social Services (MSB, decided October 6, 2004), *aff'd*, *In the Matter of Senior Training Technician (PC2241C)*, Passaic County Board of Social Services, Docket No. A-1344-04T1 (App. Div. 2005). No vested or other rights are accorded by such an administrative error. See *Cipriano v. Department of Civil Service*, 151 N.J. Super. 86 (App. Div. 1977); *O'Malley v. Department of Energy*, 109 N.J. 309 (1987); *HIP of New Jersey v. New Jersey Department of Banking and Insurance*, 309 N.J. Super 538 (App. Div. 1998).

With respect to the number of questions candidates were required to answer on the subject examination, the examination booklet contained tests for both the Sheriff's Officer Sergeant title and the Sheriff's Officer Sergeant/Training Officer title. It is common for Department of Personnel examinations to test several titles with different examination symbols since, in many cases, there are examination areas common to several titles that can be efficiently tested utilizing the same booklet. Different titles covered by the examination booklet are assigned different questions to answer. In the present matter, candidates for the Sheriff's Officer Sergeant title were only required to answer questions 1 through 70. Monitors are specifically trained to tell candidates that the number of questions they must answer for the examination for which they are competing is printed on the stub portion of their answer sheets in the space below their applicant/social security number. In addition, the monitors explain that the test booklet may contain more questions than they are required to answer and that the candidates need not be concerned with those questions and to only answer the questions noted on the stub portion of their answer sheets. Further, the computerized answer sheet unambiguously indicates, "Answer These Questions," followed by the questions the candidate is to answer under the candidate's applicant/social security number. Accordingly, Sheriff's Officer Sergeant candidates' scores were based on 70 questions.

In regard to the appellants' argument that they were not given the opportunity to provide information prior to the Board's decision in *Ferraro, supra*, as indicated in the Notification of Eligibility, candidates were provided with the opportunity to review the subject examination and file appeals. In addition, Ms. Medwin and DiGavero are being provided with the opportunity to appeal these items on reconsideration.

Regarding question 2, as discussed in *Ferraro, supra*, it is not clear from the question stem whether the woman is an accomplice to the bank robbery. *See e.g., N.J.S.A. 2C:2-6*. Even assuming, as appellants argue, that the woman is guilty of "conspiracy to commit robbery [which] is a crime covered under the five year statute of limitations," five years was not one of the answer choices. Appellants' contention that option d, no time limit applies, is correct by default is tenuous at best. While candidates are instructed to choose the best response, option d is not correct and thus, it is not the best response.

Regarding question 60, as discussed in *Ferraro, supra*, the Middlesex County Jury Management Office indicated that the Sheriff's Department is not involved and summoning jurors is solely the responsibility of the Jury Management Office. Thus, the Board correctly decided that the question, although technically correct, was not a valid measure of job knowledge for the Sheriff's Officer Sergeant title.

ORDER

Therefore, it is ordered that these requests be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.